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Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Contract Services Co., Inc.

File: B-246604.2; B-246604.4; B-246604.5; B-246604.6

Date: June 11, 1992

Jon N. Kulish, Esq., Holmes, Schwartz & Gordon, for the protester.
Jordan A. Strauss, Esq., and L. Carol Roberson, Esq., Environmental Protection Agency, for the agency.
Michael W. Clancy, Esq., Pettit & Martin, for Transcontinental Enterprises, Inc., an interested party.
Christina Sklarew, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency improperly determined that technical proposals were substantially equal, instead of finding that protester's proposal was superior, is denied where record establishes that agency reasonably evaluated the awardee's and the protester's technical proposals, and supports the agency's determination that protester's proposal was not technically superior; agency therefore properly made award on basis of awardee's lower cost.

2. Where protester's proposal lists experience of affiliated corporation, but such experience is not comparable in size and complexity to work contemplated under solicitation, agency is not required to credit protester with affiliated firm's corporate experience, notwithstanding the fact that the two corporations and their parent corporation share management personnel.

3. Cost realism analysis is not unreasonable where it accepts an overall vacation time average based on an assumption that because some employees will not be entitled to any vacation during the first year, vacation time average need not be increased to account for incumbent employees who are entitled to more than the average vacation period.

4. Protester has not been prejudiced by agency's failure to provide preaward notification to unsuccessful offeror in small business set-aside procurement where protester no longer challenges the awardee's compliance with the "50 percent rule," which requires that at least 50 percent of the cost of contract performance be incurred for in-house personnel to perform work.

DECISION

Contract Services Co., Inc. protests the Environmental Protection Agency's (EPA) award of a contract to Transcontinental Enterprises, Inc. (TEI) under request for proposals (RFP) No. D10004N1 for facilities maintenance and support services at an EPA facility in Research Triangle Park, North Carolina.[1]

We deny the protest.

The RFP was issued as a total small business set-aside procurement, and contemplated the award of a level-of-effort, cost-plus-fixed-fee contract for a base term of 1-year, with four 1-year options. The contract covers a variety of requirements, consolidating support services that had been procured under five separate contracts and six purchase orders/blanket purchase orders in the past, and adding some new services. The activities required under the contract, which range from in-house moving support, locksmith services, and mailroom operations to audio-visual program support and equipment maintenance, were listed on four separate attachments to the RFP's statement of work. The RFP contained a government estimate for the level-of-effort, applicable wage rate determinations, and a dollar amount for other direct costs and parts and materials.

The RFP advised offerors that the government would make award to the responsible offeror whose offer conformed to the solicitation and was most advantageous to the government, cost or price and other factors considered. Technical quality was stated to be more important than cost or price. The RFP stated that as proposals became more equal in technical merit, the evaluated cost would become more important. The RFP listed seven technical evaluation criteria and indicated, by points assigned to each factor, a total of 1,600 points, the relative weight they would be given in the overall evaluation of the technical proposals: (1) Corporate experience and past performance (490 points); (2) Corporate ability to provide and maintain necessary

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[1]In this consolidated decision, we address the issues raised in four separate protests, filed as B-246604.2; B-246604.4; B-2246604.5; and B-246604.6.

technical skills (120 points); (3) Demonstrated approach to the Statement of Work (120 points); (4) Experience and ability of personnel (75 points); (5) Experience and ability of Project Manager (75 points); (6) Transition plan (75 points); and (7) Quality/organization of proposal (45 points).

Ten firms submitted initial proposals by the closing date of May 31, 1991. The technical proposals were reviewed and evaluated by a Technical Evaluation Panel (TEP) convened for this purpose. The TEP prepared a report for the contract specialist, including a discussion of the evaluation process, the TEP consensus ranking of the 10 proposals (by point scores), and a narrative description of the strengths and weaknesses in each proposal. Based on the proposals' point scores, the TEP found three offerors technically unacceptable, three marginally acceptable, and four technically acceptable (including CSC and TEI). A business evaluation panel (BEP), composed of the contracting officer, contract specialist, and a cost analyst, also prepared a report. This report was presented to the chairperson of the source evaluation board (SEB), as was the TEP report. The SEB chairperson reviewed all of this information and recommended a competitive range to the source selection official (SSO). The SSO concurred in the SEB's determination that the five highest-ranking proposals--including CSC and TEI--had a reasonable chance for award and should be included in the competitive range.

Discussions were held with all five offerors in the competitive range on two separate occasions, July 29 and October 11. The discussions were conducted by telephone and confirmed in writing. After the first set of discussions, offerors were asked for various clarifications of their initial proposals and were permitted to submit revised proposals. At that time, the agency had not completed its cost realism analysis. In order to evaluate cost realism, a cost analysis report was issued on each potential contractor and major subcontractor. The Defense Contract Audit Agency (DCAA) also conducted reviews and provided audit reports for each of these firms. The EPA cost advisory services staff (CASS) reviewed the audit reports, provided some additional cost analysis, and issued a CASS report for each offeror. The second set of discussions included technical issues remaining after the evaluation of the revised technical proposals and cost issues that had been identified as a result of the agency's cost realism analysis.

Each of the competitive range offerors submitted a best and final offer (BAFO), and these were reviewed by the SEB. In the report, the SEB eliminated two firms from further consideration because of technical weaknesses and/or unreasonable cost, retaining only CSC, TEI and SSI in the

final competitive range. The SEB initially had found that TEI's proposal was not technically equivalent to the other two proposals in the competitive range, based on a weakness that was found in one portion of TEI's proposal. The SSO disagreed with this determination, however, reasoning that the weakness in one aspect of TEI's corporate experience was overcome by the strength it showed in its proposed approach to that same area. The SEB reconsidered the matter and concluded that these three offers were technically equal, based on its review of the technical evaluations and a comparison of the particular strengths and weaknesses of each proposal. Price then became the determining factor, and since TEI had offered the lowest price, this firm was selected for award. The SSO approved this determination, and the contract was awarded to TEI. This protest followed.

CSC protests that the EPA failed to evaluate proposals properly and in accordance with the evaluation criteria established in the RFP, resulting in the unreasonable determination that the proposals submitted by CSC and TEI were essentially equal technically. The protester contends that the agency's technical evaluation was erroneous both because it overrated TEI's proposal and because it underrated CSC's proposal. In addition to challenging the agency's technical evaluations, CSC disputes the validity of EPA's cost realism analysis, asserting that TEI did not offer a realistically lower price. CSC concludes that whatever price advantage TEI might have offered was insignificant relative to the protester's own technical superiority and that an award based on this slightly lower cost was improper, given the fact that technical merit was to be weighed more heavily than cost.

The technical evaluation criterion at issue in CSC's protest is corporate experience and past performance as related to similar type and size of institutional support services, worth a total of 490 points under the 1,000-point evaluation scheme set forth in the RFP. The solicitation further specified the relative weight of the corporate experience points by allocating them to four subcriteria, each related to one of the four attachments to the statement of work, which can be summarized as follows:

1. Corporate experience and past performance as related to:

(a) Attachment A-Institutional Support Services.

1. Materials acquisition, computerized inventory control methods and warehouse management and operation.

2. Comprehensive computerized preventive maintenance program operation as described in paragraph 2.4 of Attachment A.

3. All Other Sections of Attachment A.

(b) Attachment B-Miscellaneous Support.
(c) Attachment C-Receiving/Delivery, etc.
(d) Attachment D-Data Entry, etc.

CSC contends that TEI does not possess applicable experience as described under the institutional support services subfactor that could reasonably be considered comparable to CSC's experience, particularly in the areas of facility maintenance, computerized inventory control and automated institutional support preventive maintenance systems. The protester argues that although TEI's proposal may give the appearance of experience, a review of its detailed description of past and current contracts shows little or no experience that is relevant to the requirements of this solicitation. Rather, according to CSC, the experience listed in the awardee's proposal mainly consists of small contracts that are not institutional support contracts at all.

In reviewing protests challenging the propriety of a technical evaluation, we will not evaluate proposals anew and make our own determination as to their acceptability or relative merits, as the evaluation of proposals is the function of the contracting agency. Proprietary Software Sys., B-228395, Feb. 12, 1988, 88-1 CPD ¶ 143. Rather, we will examine the record in its entirety to determine whether the agency's judgment was reasonable and consistent with the evaluation criteria listed in the RFP. Pemco Aeroplex, Inc., B-239672.5, Apr. 12, 1991, 91-1 CPD ¶ 367. A protester's disagreement with the agency's evaluation is not itself sufficient to establish that the agency acted unreasonably. Correa Enters., Inc., B-241912, Mar. 5, 1991, 91-1 CPD ¶ 249. Here, after reviewing the record, we find that the evaluation was fair and reasonable and in accordance with the RFP's stated evaluation criteria.

Contrary to CSC's general assertion that TEI's experience was limited and consisted mainly of small contracts, TEI's proposal listed current performance (since 1990) of a 5-year contract with EPA that required support for four separate EPA facilities (containing more than 1 million square feet and employing 6,500 people), which included warehouse services and maintenance services; that contract's 3-year predecessor contract with EPA; a 3-year contract performing warehousing and delivery services for EPA at Research Triangle Park; and a list of approximately 30 contracts

requiring a variety of individual services, such as transportation and maintenance, full food services, golf course maintenance, etc.

More specifically, CSC's challenge of the agency's evaluation of TEI's technical proposal focuses on the three subfactors under evaluation factor 1.a. Subfactor 1.a.1, for computerized inventory control methods, refers to past experience similar to that required under paragraph 1.4.1 in the Statement of Work (Attachment A), which requires the contractor to furnish and operate a central supply activity and to account for all supplies, materials and equipment "through approved computerized inventory control procedures." CSC contends that TEI had little relevant experience in this area. However, a review of TEI's proposal reveals that performance of TEI's contracts with EPA included 5 years of experience with computerized inventories, which the Technical Evaluation Panel (TEP) considered to be a major strength, exceeding the established evaluation benchmark. We find reasonable the EPA's "adequate" rating for this subfactor.

Evaluation factor 1.a.2, for experience with preventive maintenance programs, refers to paragraph 2.4 in the Statement of Work (Attachment A), which requires the contractor to administer the computerized comprehensive preventive maintenance program for EPA facilities and equipment. CSC alleges that TEI had very little relevant experience comparable to the actual requirements described in the RFP. TEI's proposal summarized the scope of its experience in this area, stating for example, that the firm had performed contracts that required scheduling and performing preventive maintenance on over 600 items of equipment and that it has an in-house computer system that schedules preventive maintenance for all equipment. In addition, the proposal included four pages of charts describing the range of services that TEI performs and comparing them to the requirements of the RFP. TEI was given a rating of "adequate" for this subfactor which we find reasonable.

Evaluation factor 1.a.3 refers to the portions of the Statement of Work, Attachment A, that are not included in evaluation factors 1.a.1 and 1.a.2. These other portions cover a wide range of miscellaneous services that are required for the performance of institutional support, such as waste removal, general repairs, fabrication shop support, electronic security system maintenance, fire extinguisher system inspection and maintenance, etc. Referring to a chart included in TEI's proposal, CSC contends that TEI's experience was not as extensive as its own in two of the services listed under this subfactor, electronic security system maintenance and halon system inspection/testing.

However, TEI's proposal identified proposed subcontractors specializing in these areas to perform these portions of the work under the contract. We find that the agency could reasonably evaluate this experience as "adequate." In addition, we do not agree with the protester's premise that two proposals that have received the same score have to be identical in merit in each portion of the areas for which they are being evaluated, see Ogiluy Adams & Rinehart, B-246172.2, Apr. 1, 1992, 92-1 CPD ¶ ___, nor do we find it unreasonable for a proposal showing a relative weakness in one or two individual categories within a subfactor to be rated "adequate" overall for that subfactor.

TEI and CSC each received ratings of "adequate" for each of the three subfactors at issue, resulting in identical scores of 150 points out of the 250 points available for this area. On the issue of whether the agency's evaluation of this portion of TEI's proposal was unreasonable or inconsistent with the evaluation criteria established in the RFP, we find that it was not. In our view, the agency could reasonably conclude from the information provided in TEI's proposal that the firm had relevant experience that met the basic requirements and merited the "adequate" ratings for these elements of its proposal. The benchmark that the TEP established for evaluating corporate experience in this area was 3-4 years, and the record shows that TEI met this standard. We conclude that EPA's evaluation of TEI's technical proposal was reasonable, and deny this portion of the protest.[2]

In order to determine whether it was reasonable for the TEP to find that TEI's and CSC's proposals were essentially equal technically, we must examine CSC's allegation that its own score was unreasonably low because the agency improperly evaluated the corporate experience that was listed in CSC's proposal.

CSC complains that the agency did not give the firm any credit for corporate experience that was listed in its proposal as having been performed by Direct Line Distributors (DLD), a firm that shares with CSC the same parent corporation, AmeriCorp, Inc. CSC's proposal listed seven "projects" representing current or past contracts to demonstrate its experience, including one contract that was

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[2]The protester also argues that the SEB's "original determination [that TEI was not technically equal to CSC or SSI] lends support to CSC's position . . . that the TEI proposal is clearly not the technical equal of CSC's proposal." However, the mere fact that the SEB initially made this determination does not invalidate the agency's final determination.

performed by DLD that it believed was relevant to the warehousing experience required under subcriteria 1(a), 1(c), and 4(c).

In its report, the agency states that in order to receive credit, any experience that was included in a proposal had to have been performed by the entity proposing to do the work under the contract and any such experience also had to relate to similar type and size of institutional support services, functions and operations as described in the RFP's statement of work. EPA argues that DLD's corporate experience failed on both counts: there was no indication in CSC's proposal that DLD would be performing tasks under the contract, and that DLD was identified in the proposal as a wholesale distributor specializing in aftermarket automotive parts and accessories, not involved in the performance of institutional support services as relevant here. CSC argues, however, that the agency's determination in this regard was improper because AmeriCorp, DLD and CSC have common management and that the experience that was listed in CSC's proposal was that of management personnel common to AmeriCorp, CSC, and DLD.

CSC points out that in appropriate circumstances, it is proper to give credit for the previous experience of a new company's officers, or to the experience of management and working personnel involved in a new business. To the extent CSC is arguing that DLD's experience is attributable to its parent, AmeriCorp, and that the parent corporation's experience is then attributable to each of its subsidiaries (and therefore, attributable to CSC), or that the relationship between the two subsidiaries is analogous to a parent-subsidiary relationship, we do not agree with the conclusion that any of these theories necessarily required the agency to credit CSC with DLD's experience. Where the experience of an affiliated corporation is clearly related to an offeror's proposed contract performance, it may be reasonable for an agency to give credit for the affiliate's corporate experience. See York Sys. Corp., B-237364, Feb. 9, 1990, 90-1 CPD ¶ 172. Here, CSC's proposal described DLD as a wholesale distributor specializing in automotive parts and accessories. Although EPA agrees that DLD had experience in warehousing involving receiving, delivery, and supply, we believe the EPA reasonably determined that the services performed by DLD were not comparable in size and complexity to the performance of the institutional support services contemplated by the RFP. We deny this portion of the protest.[3]

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[3]In view of our conclusion that the agency acted properly in not considering DLD's contract under CSC's corporate

(continued...)

CSC also alleges that EPA's cost realism analysis was improper because it failed to detect an allegedly erroneous assumption in CSC's cost proposal. A wage determination applicable to this contract established the following requirements for paid vacations for the contractor's personnel, based on length of service (including service for predecessor contractors at the same facility): during the first year of employment, employees are entitled to no vacation time; employees with 1 to 9 years of experience are entitled to 80 hours of vacation; employees with 10 to 14 years of experience receive 120 hours of vacation; and employees with more than 15 years of experience receive 160 hours of vacation time per year. TEI's cost proposal included labor costs based on an assumption of an average of 80 hours of vacation per employee per year. CSC contends that because TEI proposed to hire qualified incumbent employees, some of whom would be entitled to more than 80 hours of vacation, its vacation cost estimates were unrealistically low. The agency, on the other hand, points out that TEI proposed to provide personnel who would be new to the facility (and would therefore not be entitled to any vacation time during the first year), although it also stated its intention to offer employment to incumbent personnel meeting TEI's standards; its proposal included only one letter of intent from an incumbent employee. EPA argues that it was therefore reasonable to accept an overall average of 80 hours per year for vacation time. We agree.

The agency's evaluation of estimated costs should be aimed at determining the extent to which the offeror's estimates represent what the contract should cost, assuming reasonable economy and efficiency. Science Applications Int'l Corp., B-232548; B-232548.2, Jan. 23, 1989, 89-1 CPD ¶ 52. An evaluation of this nature necessarily involves the exercise of informed judgment. Because the contracting agency clearly is in the best position to make such an informed judgment, our review is limited to considering whether the agency's cost realism determination is reasonably based and not arbitrary. Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD ¶ 325.

We do not find that it was unreasonable for the agency to accept the vacation time assumption in TEI's proposal. The protester's approach, on the other hand, would require the agency to speculate about the number of incumbent personnel with more than 10 years of experience at this particular facility who would both meet the awardee's standards for employment and who would accept an offer of employment. In

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[3](...continued)
experience, we find that the agency had no duty to further inquire about DLD's exact relationship with CSC.

addition, we point out that while there is some disagreement about just how much TEI's evaluated cost would have increased by the kind of cost realism adjustment that CSC is advocating, the protester does not argue that such an adjustment would have made CSC the low offeror. It would only have lessened the price advantage offered by TEI, but would not have eliminated it.

CSC is arguing that the cumulative effect of the errors it has alleged in both the technical and cost realism evaluations would suffice to invalidate the agency's source selection decision; we do not agree. We recognize that the competition in this procurement was very close; however, we find that EPA's decision ultimately was reasonable and consistent with the evaluation criteria established in the RFP.

Finally, CSC has also argued that it was prejudiced by EPA's failure to provide the pre-award notice required by FAR § 15.1001(b)(2). This regulation provides that, absent urgency, a contracting officer is required to inform each unsuccessful offeror in writing, prior to award, of the apparent successful offeror in a small business set-aside procurement. The purpose of this preaward notice, as CSC points out, is to give unsuccessful offerors the opportunity to timely challenge the small business status of the proposed awardee. See United Power Corp., 69 Comp. Gen. 476 (1990), 90-1 CPD ¶ 494. Where the agency has failed to give the required notice but the SBA ultimately denied the protester's challenge of the awardee's size status, no prejudice resulted to the protester from the lack of preaward notice. See, e.g., Science Sys. and Applications, Inc., B-240311; B-240311.2, Nov. 9, 1990, 90-2 CPD ¶ 381.

There is a distinction, however, where the protester's size challenge was directed against the awardee's compliance with the "50 percent rule" (which requires, for service contracts, that at least 50 percent of the cost of contract performance incurred for personnel be expended for employees of the awardee firm and not its subcontractor's employees)[4], since the Small Business Administration will only consider a challenge of compliance with the 50 percent rule if it is filed before the contract has been awarded. FEMCOR, Inc., B-244400; B-244400.2, Oct. 15, 1991, 91-2 CPD ¶ 335.

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[4]The so-called "50 percent rule" is contained in 15 U.S.C. § 644(o)(1)(A) and implemented by Federal Acquisition Regulation § 52.219-14(b)(1).

CSC argues that it believed, at the time of award, that TEI lacked the requisite experience to perform major portions of the contract itself, and deduced from this that the firm was planning to subcontract out more than 50 percent of the required work under the contract. However, CSC concedes that TEI's actual offer did not violate the rule. The record shows that the agency specifically examined this issue and determined that TEI proposed to subcontract less than 10 percent of the contract work. Nonetheless, the protester insists that the agency's failure to give timely preaward notice deprived CSC of its right to have the SBA consider TEI's ability to comply with the rule.

We do not agree that the agency's failure in this case to provide the requisite preaward notice resulted in the kind of prejudice required to sustain a protest. We base this conclusion on the fact that TEI's compliance with the rule is not in dispute. In FEMCOR, the issue of the awardee's compliance remained in dispute and could no longer be decided by the proper forum, the SBA. When we sustained the protest, we recommended that the agency examine the awardee's then current compliance with the 50 percent requirement and terminate the contract if it were found noncompliant. Here, there is no reason to continue to question the awardee's compliance, and sustaining the protest would be meaningless. In these circumstances, we find that the agency's failure to provide notice resulted in no prejudice.

The protest is denied.

James F. Hinchman
General Counsel